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1 RECORD OF ORAL HEARING
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3 UNITED STATES PATENT AND TRADEMARK OFFICE
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6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
8

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10 Ex parte FRANCIS PINAULT and ALAIN GUIRAUTON
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13 Appeal 2009-006035
14 Application 09/873,357
15 Technology Center 2400
16

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18 Oral Hearing Held: November 17, 2009
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22 Before KENNETH W. HAIRSTON, MARC S. HOFF, and BRADLEY W.
23 BAUMEISTER, *Administrative Patent Judges*.
24

25 ON BEHALF OF THE APPELLANTS:
26

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34 The above-entitled matter came on for hearing on Tuesday, November
35 17, 2009, commencing at 9:34 a.m., at The U.S. Patent and Trademark
36 Office, 600 Dulany Street, Alexandria, Virginia, before Debbie Courville,
37 Notary Public.
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PROCEEDINGS

THE USHER: Calendar No. 45, Mr. Levy.

JUDGE HAIRSTON: Okay, good morning, Stu, how you doing?

MR. LEVY: Fine, good morning.

JUDGE HAIRSTON: You may begin.

MR. EWERS: Good morning, Your Honors. First I would like to introduce myself. My name is Falk Ewers, I'm from the Sughrue, Mion law firm, and I represent -- in this Appeal No. 2009-006035. The case involves providing access control for users accessing a computer network such that the Internet -- the computer effort can be in the Internet and this access is provided by an access node. I would like to first discuss independent claims 1 and 10, and thereafter, I would like to turn to dependent claims 5 and 7.

With respect to Claim 1, Claim 1 recites a method, and in this method a multimedia data stream is temporarily stored and a filtering is performed as a function of a particular criteria provided from the private network, and a signature is analyzed for the purpose of said filtering. The Examiner contends that the filtering device in -- invention is a part of the private network and this reads on providing particular criteria from the private network. This contention of the Examiner is wrong and I will explain why.

JUDGE HAIRSTON: Counsel, this point of arguing where you discuss as a function of particular criteria provided from said private network, can you direct me to where in the record that argument is made before the Reply Brief?

MR. EWERS: The argument is made in the Appeal Brief with respect to the limitation analyzing a signature including -- included in said

1 multimedia data stream for the purpose of said filtering. Said filtering is --
2 and this is the last limitation in Claim 1 --

3 JUDGE HAIRSTON: Yes, sir.

4 MR. EWERS: -- and this for the purpose of said filtering includes or
5 refers to said filtering above as a function of the particular criteria provided
6 for said private network. So the analyzing of a signature is done for the
7 purpose of said filtering, so this argument was introduced in the Appeal
8 Brief.

9 JUDGE HOFF: Could you direct me to where in the Appeal Brief
10 there is discussion of the particular phrase "as a function of particular criteria
11 provided from said private network"?

12 MR. EWERS: In the Appeal Brief, as I said, the limitation analyzing
13 the signature included in said multimedia data stream for the purpose of said
14 --

15 JUDGE HOFF: I certainly agree that there's argument in the Appeal
16 Brief having to do with the last clause of the claim, analyzing a signature.

17 MR. EWERS: Correct, and the last clause of the claim recites for the
18 purpose of said filtering, for the purpose of said filtering, and this is
19 discussed in the Appeal Brief and this refers to filtering as a function of the
20 particular criteria. Even though the, the wording as a function of a particular
21 criteria might not be explicitly discussed at that point, but it is referred to by
22 discussing this limitation. As I said, the contention of the Examiner that a
23 particular criteria is provided from the private network because Toga teaches
24 that the filtering device is a part of the private network. That is incorrect
25 because there's no reason to conclude from the fact that a filtering device is

1 part of the private network, that the criteria, the particular criteria, that is
2 provided from said private network. Instead, Toga teaches something
3 completely different, and the paragraph which is cited by the Examiner, for
4 example, in the final Office Action on which the Examiner relies on, this is
5 column 2, line 44 to column 3, line 26, does not teach this limitation. And
6 this paragraph --

7 JUDGE HOFF: Is it your position that the user terminals of Toga are
8 not part of the private network?

9 MR. EWERS: Well, this is not the issue here. The issue is if the
10 criteria is provided from the private network.

11 JUDGE HOFF: But if the user terminals are part of the private
12 network, it seems to me it is the issue here.

13 MR. EWERS: No, the issue is, let's put it in other words, where the
14 criteria comes from. So the criteria is the criteria provided from the private
15 network or, for example, is the criteria provided by the Internet service
16 provider from outside the private network. And this is the case with Toga
17 because Toga teaches HTML Website, for example, and you have content
18 tags.

19 JUDGE HOFF: Yes.

20 MR. EWERS: These content tags are provided by the Internet service
21 provider or from the outside, but not from the private network.

22 JUDGE HOFF: Correct.

23 MR. EWERS: And these criteria there cannot correspond to the
24 criteria recited in Claim 1 because the criteria in Claim 1 is provided from
25 the private network and not as in Toga from outside the private network, that

1 means from the Internet service provider or from the Web server which
2 provides the Website. That's why --

3 JUDGE HOFF: Toga certainly teaches content tags, but the decision
4 has to be taken somewhere whether to act on those content tags or not.

5 MR. EWERS: Correct, but the question is is the -- or the issue is is
6 the criteria provided from the private network. The criteria in Toga, that
7 means the content tag is provided --

8 JUDGE HOFF: Not necessarily. As I said the decision on whether to
9 act on the information of those content tags --

10 MR. EWERS: The question is not -- excuse me, Your Honor, I didn't
11 want to interrupt you.

12 JUDGE HOFF: Yes, sir.

13 MR. EWERS: The question is not whether a determination if the
14 criteria is met is, is made with respect to this limitation. The issue is
15 whether the criteria is provided from the private network, and this is what I
16 say even if there is a determination later done somewhere, the criteria itself
17 as explained in Claim 1 is in Toga not provided by the -- from the private
18 network, but, for example, provided by the Internet service provider by
19 providing the tag.

20 JUDGE HOFF: What is your basis in the specification for the
21 definition of criteria you are currently advancing?

22 MR. EWERS: In the specification -- let me go into it -- in the
23 specification, the criteria is defined as a certain norm or a certain rule, and I
24 will find you one citation for example. If you go to page 9 in the
25 specification, then you see a data -- this is line 29, for example. It's talking

1 about a determination of conformance with what was -- what has been
2 received against a particular norm or against particular norms. And these
3 particular norms are the criteria, for example, set from the private network.
4 So this is one, and then there is another citation where it's talking about --

5 JUDGE HOFF: Why does this not conform to the situation in Toga
6 where the material coming in may have a violent content tag associated with
7 it, but for one user that content may, therefore, be blocked, but for another
8 user, that content will not be blocked.

9 MR. LEVY: If I can add something on this point with Toga, in Toga,
10 Toga's going to provide you with a criteria from which you make a selection.
11 Toga will ask you do you want violent content or not, how much do you
12 want to pay, what kind of download speed can you accept, things like that.
13 Now, from these criteria that are provided from Toga, you make a
14 determination of what you want. You might say well, I have young children
15 in the house, I don't want them to see violent content, so you make that
16 determination. Now from that, the browser then takes the -- what's being
17 downloaded to the data stream and makes a determination from that -- what's
18 beamed down there according to what determinations you've made. So it
19 says oh, this is violent content, we're not going to show it, we're not going to
20 accept it. However, the criteria itself is always provided by the ISP, not by
21 the user. The user makes determinations based on the criteria that's sent, and
22 from that you have a menu. Like you go into a restaurant, you don't bring in
23 a menu and say here's what I want you to cook for me. You go into a
24 menu -- a restaurant, they provide you with a menu and then you select what
25 you want. So where the content -- the criteria is provided from is from the

1 ISP in Toga and that's what distinguishes Claim 1. And so we go from that
2 perspective, that's where he has the violent content, the selections you make.
3 I'll provide it to you, you make the selections, and then from the
4 selections --

5 JUDGE HOFF: So as you say, the user or the administrator is making
6 decisions on what content should or should not be provided.

7 MR. LEVY: Well, actually the user, as I believe in Toga, you make
8 the determination of what you want --

9 JUDGE HOFF: Well, as I say, perhaps it's a parent/child situation or
10 you can say administrator, but it seems to me that that person is either a part
11 of the private network or is working with the private network.

12 MR. LEVY: Oh, absolutely. There's no doubt that in Toga --

13 JUDGE HOFF: It seems --

14 MR. LEVY: -- the person making the determination is part of the
15 private network. And also within the private network and my understanding
16 of the reference is that it takes the determinations you make and uses them in
17 comparing it with the tag that comes down from the data stream and makes a
18 determination, but it may act within the private network under
19 determinations you've made. But the criteria for -- as language in the Claim,
20 the particular criteria is not provided in the private network. The criteria is
21 provided by the service provider. The service provider provides this
22 particular content or criteria. You select among the criteria, and your
23 selection is done within the private network. And then within there, your
24 browser will compare the tag coming down from the data stream with what
25 your determination was, but the particular criteria is always from the ISP.

1 The criteria itself is not from the private network, and that's the point I was
2 trying to --

3 MR. EWERS: And this is exactly what I tried to make this point. So
4 the question is where the criteria comes from. Is it provided by the -- from
5 the outside by the Internet service provider as a content tag in an HTML
6 Website or is it provided from inside as the claimed language says, provided
7 from said private network as a norm, for example, which is provided from
8 the inside. So this distinguishes Claim 1 from Toga or Toga from Claim 1.
9 That's why Toga does not teach this limitation. This applies also to Claim
10 10 because independent Claim 10 analogously recites this feature.

11 I would like to turn now to dependent claims 5 to 7. Dependent Claim
12 5 recites a multimedia data streams -- oh, I start at the beginning,
13 temporarily delayed data which comprises said multimedia data stream start
14 in the determination of conformance as retained to enable a further check.
15 In other words, the data is retained after a first check was done for a second
16 check. Going back to Toga, the Toga reference teaches that after a check
17 has been performed, for example, a Website has been identified as
18 containing violent content, then the access to this Website is denied and the
19 data of this Website is not downloaded because, for example, if you have
20 children working on a computer and you don't want to grant the access, then
21 you don't want this file on your computer and that's why the access is
22 denied. So that's why Toga does not teach after the access is denied retaining
23 this data --

24 JUDGE HOFF: The Examiner does not rely on Toga for the teaching.

1 MR. EWERS: Correct, but the Examiner relies on the Cotten
2 reference, I hope I pronounce as correct, Cotten reference, as allegedly
3 teaching this feature. The first issue here is that why would one modify
4 Toga with the Cotten reference to retain the data with violent content, for
5 example. You don't want, you have to come back to this example, your,
6 your child on the computer after the violent content is rejected to get another
7 question are you really sure that you don't want to get this data, you don't
8 want to have this because your, your child might say oh, yes, I want it. So,
9 Toga tries to avoid this situation because after the criteria, the criteria of the
10 content is met, the access is denied so there's no content of this data stored.
11 Why would you modify Toga to store this data of this video stream or
12 whatever it is? The second issue, even assuming arguendo that Toga would
13 be modified by, by the Cotten reference, Cotten itself does not teach this
14 feature for the following reasons. Cotten teaches identifying spam e-mails,
15 and these spam e-mails are also called bulk e-mails. I have to apologize for
16 a wrong --

17 JUDGE HOFF: No, you're quite correct.

18 MR. EWERS: -- and this -- these spam e-mails again, the content of
19 these spam e-mails is not retained because these spam e-mails are identified
20 to be deleted. There's only an identifier which is kept to further analyze for
21 later e-mails which you receive.

22 JUDGE HOFF: Isn't what is kept the content of the message after
23 stripping identifying headers?

24 MR. EWERS: No, what is kept is an identifier. If I -- and this is what
25 actually the Examiner refers to, the identifier is the signature in Cotten. And

1 if you go to page 14 of the Examiner's Answer, for example, the Examiner
2 says that the detected nonconformance data, that is, the signature is retained.
3 This statement is wrong, too, because yeah, the signature is retained, but this
4 statement is made with respect to retaining the, the data stream. And the
5 data stream in Cotten is not retained, but the signature is retained.

6 JUDGE HOFF: If I may direct your attention to the bottom of column
7 3 of Cotten.

8 MR. EWERS: Okay.

9 JUDGE HOFF: Line 61, the first operation attempt at establishing the
10 identity of the message text, opening addresses, and personal reference. So
11 they take out the addresses and --

12 MR. EWERS: From -- this is column 3?

13 JUDGE HOFF: Column 3, line 61 and continuing. So you strip the
14 address and the personal references. Then it says the remaining message
15 text portion thus serves to identify an individual message signature. The
16 signature is then coded in an abbreviated format. Is it your position that the
17 entire message or content in the invention must be retained -- excuse me, in
18 the reference in order to meet your claim?

19 MR. EWERS: In order to meet our Claim, the entire spam e-mail
20 would represent the data stream for the bulk e-mails. So the entire spam e-
21 mail would -- one would have to retain the entire e-mail to meet the Claim --

22 JUDGE HOFF: What Claim language requires that?

23 MR. EWERS: What?

24 MR. LEVY: If I can add something here, Claim 5 says which
25 comprises said multimedia data stream stored in a determination

1 conformance is retained. So it's the data stream that has to do that. I believe
2 that in the reference it is -- it's just a signature that's coded in it, but in any
3 event, irrespective of what Cotten may teach, I don't think the combination
4 would have been obvious for the following reasons. In Toga, if you have a
5 situation where you get this predetermined criteria and you make a
6 determination that you don't want violent content coming into your home for
7 your young children to see, why would you ever want to then retain the
8 video of violent content and make a further check in the event of
9 nonconformance with it. If it's nonconforming in Toga, it doesn't come in.
10 Why would you want to then make a further check for that?

11 JUDGE HOFF: And if you ask Cotten for that motivation -- for
12 example, if your child were to click on the same link again, it seems to me
13 that Cotten provides the motivation that a faster determination that this
14 content is nonconforming could be done if there were a stored representation
15 of that content already on your machine.

16 MR. LEVY: Yeah, but in Toga, if you make a determination that you
17 don't want violent content coming in, your child tries to bring in something
18 with violent content, the last thing you would want is for the system to say
19 are you sure you don't want this because a child will say yeah, of course, I
20 want it. And so, Toga is set up in a way where once you set that you don't
21 want it, it's not provided. So because of that, I don't see why one of ordinary
22 skill in the art would be motivated to then go and perhaps ask a child are you
23 sure you don't want it and then have the kid say yes because it defeats the
24 whole purpose of Toga I believe to do that. So I don't think that one of

1 ordinary skill in the art would have been motivated to modify Toga in that
2 fashion.

3 JUDGE HOFF: Do you have any reason to look at the reference and
4 say that such a message would have come up like a dialogue box that would
5 say are you sure you don't want this content? That's not my understanding
6 of how these two references work.

7 MR. LEVY: No, I said -- well, Toga doesn't say that, but I'm saying
8 the claim language saying -- says that the multimedia data stream is retained
9 to enable a further check in the event of nonconformance. What I'm saying
10 is that in Toga if there's nonconformance, it would say violent content and
11 you've already indicated you don't want violent content, it's not sent. So
12 because of that, I don't think there's any reason to then retain that multimedia
13 data stream after it's been determined that it is in nonconformance. Do you
14 want to go on to Claim 6?

15 MR. EWERS: Yes. Turning to Claim 6, Claim 6 recites -- also
16 recites that the multimedia data stream is retained, but in this case, to enable
17 interruption of a subsequently received multimedia data stream before
18 complete analysis. This is again the same issue that's in Claim 5 because
19 one would not be motivated to modify Toga to retain the data for the same
20 reasons as, as discussed in, in Claim 5. The second argument is to provide --
21 this, this feature is also allegedly taught by Cotten, and in Cotten we need to
22 analyze the bulk e-mail or the spam e-mail. It's not enough to have a part of
23 this e-mail or to -- yeah, you need a complete analysis of these e-mail even
24 against the --

1 JUDGE HOFF: Counsel, where does the argument appear with
2 regard to the before complete analysis language prior to the Reply Brief?

3 MR. EWERS: If you go to the Appeal Brief, page 13 to 14, the
4 argument with respect to Claims 5 to 7 are presented, and if you go to page
5 14, then you see that Claim 5 and Claim 6 are discussed.

6 JUDGE HOFF: They are.

7 MR. EWERS: And the limitation of Claim 6, data for which
8 nonconformance has been detected in said multimedia data stream is
9 retained to enable interruption of subsequently received multimedia data
10 stream.

11 JUDGE HOFF: Where are you reading? On page 15?

12 MR. EWERS: I'm on page 14 of the Appeal Brief.

13 JUDGE HOFF: I see no discussion of Claim 6 on page 14.

14 MR. EWERS: The discussion started on page 13 and then it's going
15 to 14.

16 JUDGE HOFF: The first reference to Claim 6 appears on page 15,
17 apart from the heading, that is.

18 MR. EWERS: Maybe that's -- I have the Appeal Brief --

19 JUDGE BAUMEISTER: Are there two different Appeal Briefs, one
20 was filed in --

21 JUDGE HOFF: Oh, that's possible --

22 MR. EWERS: Maybe that is -- yeah, maybe that is why the -- sorry.
23 This is the original Appeal Brief I have in front of me, so I can check the
24 other version.

1 JUDGE HOFF: In any case, I'm still wondering where argument
2 directed to the before complete analysis language appears?

3 MR. EWERS: Yeah, it's starting -- with the corrected Appeal Brief,
4 the argument starts on page 14 to page 15.

5 JUDGE HOFF: Well, I understand that the section on Claims 5
6 through 7 bridges pages 14 and 15. What I'm asking you is your basis for
7 arguing or stating that this argument is entitled to consideration being that it
8 does not appear to have been made before the Reply Brief.

9 MR. EWERS: I have to -- I'm surprised about this and I would have
10 to go back and take a further look on this.

11 JUDGE HAIRSTON: Counselor, your allotted time is up. Your
12 allotted time is up. Can I get you to take just one minute to sum up? Your
13 20 minutes has been gone over, so could you take 1 minute and just sum up?

14 MR. EWERS: The rest of the arguments?

15 JUDGE HAIRSTON: Yes, yes.

16 MR. EWERS: Okay.

17 JUDGE HAIRSTON: I'm giving you one minute.

18 MR. EWERS: Yes. The last argument I want to make is regarding
19 Claim 7, and Claim 7 talks about --

20 JUDGE HOFF: Counselor, I'm going to ask you the same question
21 with regard to Claim 7 which does not appear to have been specifically
22 argued before the Reply Brief. If you'd like to take that minute to sum up
23 your arguments in total, I understand and you may do that.

24 MR. EWERS: Okay. Then I would like to summarize my arguments.
25 First, the Toga reference does not teach or suggest providing a criteria from

1 a private network and that's why for this reason independent claims 1
2 through 10 are patentable over this reference. And the Toga reference even
3 in combination with the Cotten reference does not teach retaining the
4 multimedia data stream for further check. And also, Claims 5 and 6 and 7
5 depend from Claim 1 and are patentable at least by virtue of their
6 dependency from Claim 1.

7 JUDGE HAIRSTON: Okay, thank you, Counselor.

8 JUDGE HOFF: Thank you.

9 (Whereupon, the proceedings, at 10:06 a.m., were concluded.)

